Editor's note: Reconsideration denied by order dated Jan. 26, 1982; Reconsideration granted; decision vacated -- See Andrew Gordon McKinley, 61 IBLA 282 (Feb. 2, 1982)

CHRISTINA LAVERNE HANLON, ET AL.

IBLA 76-41, etc. Decided December 2, 1975

Consolidated appeals from decisions of Alaska State Office, Bureau of Land Management, rejecting Native allotment applications for land within the Tongass National Forest.

Affirmed.

1. Alaska: Native Allotments

   Native allotment applications for lands in the Tongass National Forest may be allowed only if (1) the application is founded on occupancy prior to the inclusion of the lands within the forest or (2) an authorized officer of the Department of Agriculture certifies that the land in the application is chiefly valuable for agricultural or grazing purposes.

2. Alaska: Native Allotments

   A Native who has applied for an allotment within a national forest must show that he personally complied with the law in establishing occupancy and use prior to the effective date of the forest withdrawal and he may not tack on his parents' or grandparents' use and occupancy to establish a right in himself commencing prior to the creation of the forest.

3. Alaska: Native Allotments

   Under the Alaska Native Allotment Act, a Native must be old enough to exert independent use and control of the land at the time he initiates his claim, and must occupy the land to the potential exclusion of others.

APPEARANCES: Donald E. Clocksin, Esq., Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This is a consolidated appeal from substantially identical decisions of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications 1/ filed pursuant to the Act of May 17, 1906, as amended and supplemented, 43 U.S.C. §§ 270-1 through 270-3 (1970) 2/ for lands within the Tongass National Forest. The basis for the State Office's rejection was that the applications were not founded on personal occupancy prior to the inclusion of the lands within the forest, nor were the lands certified by the Forest Service as chiefly valuable for agricultural or grazing purposes.

Appellants incorporate by reference the statement of reasons filed in the case of Deborah A. Dalton et al., IBLA 75-78.

[1] The Dalton case was decided by this Board in Louis P. Simpson, et al., 20 IBLA 387 (1975). In that decision affirming the rejection of Native allotments within the Tongass National Forest, the Board cited the Native Allotment Act, as amended and supplemented, which provided in part:

> The Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska * * * to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family, or is twenty-one years of age * * *. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

43 U.S.C. § 270-1 (1970).

1/ The applications considered in this opinion are: Christina Laverne Hanlon, AA 7947, IBLA 76-41; Sandra Y. Arca, AA 7742, IBLA 76-128; Andrew Gordon McKinley, AA 7922, IBLA 76-23; Annie Bennett, AA 7017, IBLA 76-25.

2/ The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (Supp. III, 1974), but applications pending in the Department at that time could be processed.

> Allotments in national forests may be made * * * if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.
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> Added August 2, 1956; 43 U.S.C. § 270-2 (1970).
>
> No allotment shall be made to any person * * * until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.
>
> 43 U.S.C. § 270-3 (1970).

According to the Bureau of Indian Affairs Native allotment list, Christina Laverne Hanlon was born on December 27, 1951, and Sandra Arca was born on May 16, 1945. The lands included in the applications were withdrawn by Presidential Proclamation on August 20, 1902, and February 16, 1909. 3/ The withdrawals segregated the lands from appropriation under the public land laws, including settlement under the Native Allotment Act. Since these appellants were born subsequent to the date the lands were included in the forest, it would have been impossible for them to have used and occupied the land prior to the creation of the forest. Also, a letter in the case file from the Forest Service, Department of Agriculture, states that the land is not chiefly valuable for agricultural or grazing purposes. Therefore, these appellants are not qualified for an allotment of these lands under the Native Allotment Act.

[2] The Board further held in Simpson, supra, that a Native who applied for an allotment must show that he personally complied with the law in establishing occupancy and use prior to the effective date of the Forest Service withdrawal, and he may not tack on his parents' or grandparents' use and occupancy to establish a right in himself commencing prior to the establishment of the Forest. These principles were reaffirmed in Mary Y. Paul, 21 IBLA 223 (1975).

3/ Sandra Arca's case file contains a letter, dated September 24, 1975, from the City of Kodiak and Kodiak Island Borough indicating that they wish to preserve an interest in the lands. As of this date they have not submitted any information for our consideration. In light of our holding, there is no need to defer this decision, as it does not affect any interest which the City or Borough may assert.

The factual situation differs in the cases of Andrew Gordon McKinley and Annie Bennett in that these appellants were born prior to the time the lands applied for were included in the forest. Andrew Gordon McKinley was born on February 16, 1911, and the lands in question were temporarily withdrawn on April 1, 1924, by Executive Order 3983 pending a determination as to the advisability of including them in a national monument. Presidential Proclamation 1733 on February 26, 1925, revoked Executive Order 3983. The lands were later withdrawn by Presidential Proclamation on June 10, 1925, and included in the Tongass National Forest. Annie Bennett was born on May 10, 1897, and according to her application, claimed occupancy since 1900. The lands listed in her application were withdrawn by Presidential Proclamation of February 16, 1909. These appellants were 13 and 12 years of age, respectively, on the crucial dates of the withdrawals. The fact that they claimed occupancy prior to the dates of the withdrawals does not entitle them to the allotments.

[3] In order to establish a right to an allotment for land withdrawn after use and occupancy was initiated, a Native must show that his use and occupancy was initiated 5 years prior to a withdrawal of the land from such appropriation. Christian G. Anderson, 16 IBLA 56 (1974). Thus appellants would have had to establish their use and occupancy before 1919 in McKinley's case, and before 1904 in Annie Bennett's case in order to complete the 5-year period prior to the date of the withdrawal. They would have been 8 and 7 years of age, respectively. In order to meet the requirements of the law, an applicant must be old enough to exert independent use and control of the land and must be occupying the land to the potential exclusion of all others during this 5-year period. James S. Picnalook, Sr., 22 IBLA 191 (1975). The contention that a child of that age could have exerted independent use and control of the land to the potential exclusion of others cannot be accepted. Helen F. Smith, 15 IBLA 301 (1974); James S. Picnalook, Sr., supra. For this reason and the reasons discussed above, these applications must be rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE GOSS, CONCURRING IN PART AND DISSENTING IN PART:

As to appellants Hanlon and Arca, I concur in the majority opinion. However, for the reasons set forth in the special concurrence in James S. Picnalook, Sr., 22 IBLA 191, 195-201 (1975), I feel that Annie Bennett and Andrew G. McKinley have made a prima facie showing of personal use and occupancy. Mrs. Bennett was born May 10, 1897. Her application states that she lived on the homestead land year around from 1900-1920. The land was not withdrawn until 1909. Mr. McKinley was born February 16, 1911, and the land was withdrawn in 1924. It appears that he claims personal occupancy and use with his family, for fishing during spring through fall since that time.

While the McKinley application contains the Bureau of Indian Affairs certificate required under 43 CFR 2561.1(d), the certificate set forth on Mrs. Bennett's application contains deletions. Unless the required certificate can be obtained, the application must be rejected. No patent should be issued in either case until the required field examination and report thereof has been completed. See Memorandum from Assistant Secretary, Land and Water Resources to Director, Bureau of Land Management, "Adjudication of Pending Alaska Native Allotment Applications," October 18, 1973.

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Joseph W. Goss
Administrative Judge